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IN THE

Supreme Court of the United States

October Term, 1962.

No. 605.

UNITED STATES OF AMERICA

v.

ABE LIPSKY,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Judges of the Said Court:

The Petitioner, by his attorney, Isidor Ostroff, respectfully petitions for a writ of certiorari to review the Judgment of the United States Court of Appeals for the Third Circuit entered on October 26, 1962.

OPINIONS BELOW.

The Opinion of the United States Court of Appeals for the Third Circuit is not yet reported. A copy of this Opinion is attached to this Petition.

JURISDICTION.

The defendant stands convicted of a criminal offense against the United States. Therefore, discretional jurisdiction lies with this Court to review the manner of his conviction. (Act of June 25, 1948, C. 646, 62 Stat. 928, 28 U. S. C. A. 1254.) The defendant has also raised the question of the violation of his constitutional rights under the Fifth and Fourteenth Amendments to the Constitution of the United States.

QUESTIONS PRESENTED.

1. Where defendant agrees to buy stolen property before it is stolen from four men who have previously conspired to steal it, is the defendant guilty of conspiracy to steal?

2. Where defendant is arrested in his home in the early morning and refuses to give a statement to the F. B. I., can the United States Attorney demand from the defendant on the witness stand an explanation as to why he refused to tell his story when he was first arrested?

STATEMENT.

Question No. 1.

Four men agreed to steal a truck from interstate commerce. Subsequently, one of these men approached the defendant and asked him to buy the contents of the truck after it was stolen.

The defendant contends he was told the merchandise was distress merchandise. The defendant agreed to buy the merchandise. The theft was completed. However, the defendant never bought the merchandise. Can a jury verdict convicting the defendant of conspiracy to steal be sustained? Is not the defendant's conduct only an attempt to purchase stolen goods? Does not this case fall into the pattern of the logic of Judge Learned Hand in *United States v. Andolschek*, (C. A. 2nd Cir.) 142 F. 2d 503 (1944):

> "It is true that at times courts have spoken as though, if A makes a criminal agreement with B, he becomes a party to any conspiracy into which B, may enter, or may have entered with third persons, that is of course an error; the scope of the agreement actually made always measures the conspiracy and the fact that B engages in a conspiracy with others is as irrelevant as that he engages in any other crime."

In *Bollenbach v. United States*, N. Y. 1946, 66 S. Ct. 402, 326 U. S. 607, 90 L. Ed. 350 (1946), a defendant knew of a conspiracy to steal securities before the theft. This court held, however, that he could not be convicted of a conspiracy to transport stolen securities across state lines merely on proof that he helped to sell the stolen securities. In this case, the defendant should not be held guilty of a conspiracy to steal simply because he agreed to buy the stolen merchandise from the four conspirators.

Question No. 2.

The defendant was arrested in his home at an early hour in the morning. When questioned, he refused to give a statement. At the trial the defendant took the stand in his own defense. The United States Attorney hammered repeatedly at the defendant as to why he did not give a statement to the F. B. I. immediately upon his arrest. This action of the United States Attorney constituted a violation of the rights guaranteed to the defendant by the Fifth and Fourteenth Amendments to the Constitution of the United States. See, *Helton v. United States*, 221 F. 2d 338 (5 Cir. 1955); *McCarthy v. United States*, 25 F. 2d 298 (6 Cir. 1928); *Yep v. United States*, 83 F. 2d 41 (10 Cir. 1936).

REASONS FOR GRANTING THE WRIT.

This writ should be granted because the defendant has been found guilty of a crime he did not commit. The defendant at the most is guilty of an attempt to receive stolen goods. Four other men conspired to steal; he agreed to buy. Their conspiracy was complete before he agreed to buy. He agreed to buy alone; he had no conspirators. The conviction should be reversed.

This Writ should also be granted because defendant's constitutional rights were invaded. The defendant had the right to remain silent when arrested. Extensive cross-examination by the United States attorney as to why de-

fendant remained silent deprived him of his constitutional right to remain silent. The defendant should receive a new trial.

CONCLUSION.

For the foregoing reasons, it is submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

ISIDOR OSTROFF,
OSTROFF, LAWLER & BAKER,
Attorneys for Petitioner.

APPENDIX.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 13,948.

UNITED STATES OF AMERICA

v.

ABE LIPSKY,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

Argued September 18, 1962.

Before MARIS, MCLAUGHLIN and GANEY, *Circuit Judges.*

Opinion of the Court.

(Filed October 26, 1962.)

By MARIS, *Circuit Judge.*

The defendant, Abe Lipsky, appeals from a judgment entered in the District Court for the District of New Jersey on a jury verdict of guilty under the fifth count of an indictment charging him with conspiring with five others to steal, unlawfully transport, convert to their own use, receive, possess and conceal goods in violation of sections 371, 659 and 2314 of title 18, United States Code. The indictment was dismissed as to one co-defendant, Louis Marino; the other four co-defendants, Francis J. Gianatiempo, Patrick J. De Lellis, Joseph J. Murro and Michael A. Lo

Sasso, entered pleas of guilty, and the defendant Lipsky alone was tried. He was convicted and sentenced to one year imprisonment. This appeal followed. Reversal of the judgment is sought on the grounds that the evidence was insufficient to sustain the verdict of the jury and that the defendant Lipsky was prejudiced by cross-examination. We find no merit in either of these contentions.

The evidence produced by the Government at the trial tended to prove, inter alia, that some weeks prior to the theft it was agreed between Gianatiempo, Lo Sasso, De Lellis and Murro that Gianatiempo, a truck driver, would take a loaded tractor-trailer and deliver it to a pre-arranged destination, that Lo Sasso with De Lellis would dispose of the stolen merchandise, and that the proceeds would be divided among them. That night Lo Sasso met the defendant Lipsky with whom he discussed disposing of the stolen merchandise and Lipsky "set" a price at "twenty-five percent of the wholesale price" of any merchandise. They exchanged telephone numbers. Prior to the theft, Lo Sasso and Gianatiempo met the defendant Lipsky who inquired whether Gianatiempo knew what merchandise would be on the trailer and whether there was a possibility of obtaining whiskey. Gianatiempo described the modus operandi and told Lipsky that he would not know what was on the trailer since it would be sealed. Lipsky stated that regardless of the kind of merchandise, the price would be twenty-five percent of its wholesale value. Following the theft, the defendant Lipsky, with Lo Sasso, visited the place where the stolen merchandise was stored. He examined some of it and told Lo Sasso to ascertain the dollar value from the packing slips. Shortly thereafter the defendant brought to the scene one Anthony Agresti, a prospective buyer, who examined the merchandise and set a price.

The defendant Lipsky took the stand in his own defense. He admitted that he met Lo Sasso before the date of the theft, that they exchanged telephone numbers and that he examined the merchandise at the place where it was

stored. But he said that the merchandise was comprised of small lots of a variety of items which he could not use and he brought Agresti in as a prospective buyer. His defense was that he had solicited Lo Sasso to purchase eggs from him at which time Lo Sasso inquired whether he would be interested in buying some stress merchandise[1] and that he did not know that the merchandise was stolen.

We are satisfied that the jury was entitled from this evidence to find, as it did, that the defendant Lipsky was a member of the conspiracy charged in the indictment. It is true, of course, that he was not an original member of the conspiring group. The evidence, however, supports the finding that he subsequently joined the conspiracy before it was consummated by the theft of the tractor-trailer and that he assumed an important and indeed essential function in the conspiracy. This was to assure his confederates that if they proceeded with their plan to steal the trailer they would be able to secure from the stolen merchandise the money which it was their basic object to obtain. He thus played a part in the conspiracy which, although different from that of his confederates, was necessary to the accomplishment of its objective. See Lefco v. United States, 3 Cir. 1934, 74 F. 2d 66, 68-69.

The contention of defendant Lipsky that he was prejudiced by his cross-examination requires no extended discussion. While Government counsel did press him for an explanation of his failure at the time of arrest to tell the arresting agent the story which he told on the witness stand this was not improper in view of the fact that he had at the time of arrest told the officer a different story. Under the circumstances, the Government clearly had the right through cross-examination to explore the reason for the difference and to attempt to secure the defendant's explanation of it.

The judgment of the district court will be affirmed.

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1. The defendant defined stress merchandise to mean "bankrupt stock, job lots, anything that somebody wants to get rid of."

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 13,948.

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ABE LIPSKY,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

Present: MARIS, MCLAUGHLIN and GANEY, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Attest:

IDA. O. CRESKOFF,
Clerk.

October 26, 1962

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 605

ABE LIPSKY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 5) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on October 26, 1962 (Pet. App. 8). The petition for a writ of certiorari was filed on November 21, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was sufficient evidence to support petitioner's conviction for conspiracy to steal, receive, possess, conceal and transport goods stolen in interstate commerce.

2. Whether the cross-examination of the petitioner was proper.

STATEMENT

Petitioner and five others were indicted for conspiracy to steal, unlawfully transport, convert to their own use, receive, possess and conceal goods in violation of 18 U.S.C. 371, 659, and 2314. The indictment was dismissed as to one co-defendant, and the other four co-defendants pleaded guilty, with the result that petitioner alone was tried. Petitioner was found guilty and was sentenced to imprisonment for one year. The judgment was affirmed on appeal.

At the trial the government presented evidence which tended to prove that some weeks prior to the theft the co-defendants, Gianatiempo, LoSasso, DeLellis and Murro, agreed that Gianatiempo would steal a loaded tractor-trailer and deliver it to a prearranged destination, and that LoSasso and DeLellis would dispose of the stolen merchandise, the proceeds to be divided among the four men (R. 17-19, 32, 45-46). That night LoSasso met with the petitioner and discussed the possibility of disposing of some stolen merchandise. Petitioner set the price he would pay at twenty-five per cent of the wholesale value (R. 32-33). Then petitioner and LoSasso exchanged tele-

phone numbers (R. 33). Prior to the theft, LoSasso, accompanied by Gianatiempo, met again with petitioner who inquired whether Gianatiempo knew what merchandise would be on the trailer and whether there was any possibility of obtaining whiskey (R. 20-21). Gianatiempo described the method of operation at the freight terminal and told petitioner that it was impossible to know what was on a specific trailer since all the trailers were sealed (R. 21). Petitioner stated that he would pay twenty-five per cent of the wholesale value regardless of the kind of merchandise (R. 34). After the theft, petitioner, accompanied by LoSasso, visited the garage where the stolen merchandise was hidden. He examined some of it and told LoSasso to ascertain the dollar value by totaling up the packing slips (R. 36-39). Two days later petitioner introduced Anthony Agresti who offered to purchase the merchandise for $3,000 (R. 23, 35, 40-42). Before the sale could be consummated the parties were arrested and the property recovered.

Petitioner took the stand in his own defense. He admitted exchanging telephone numbers with LoSasso before the theft (R. 63) and visiting the garage at 231 Laird Avenue in Cliffside Park, New Jersey, to examine the merchandise (R. 66). Petitioner's defense was that he did not know the goods were stolen (R. 72). On cross-examination, when government counsel inquired of petitioner if he had been interrogated by the officers who had arrested him, petitioner replied that he had (R. 75). He was then asked what his reply had been, and he answered, "I don't know from nothing" (R. 77). In rebuttal the gov-

ernment called an agent of the Federal Bureau of Investigation who testified that petitioner, when arrested, said that he had gone to New Jersey to get money because he was financially hard-pressed and that he did not know where 231 Laird Avenue was (R. 90).

ARGUMENT

1. Petitioner's attack on the sufficiency of the evidence was fully reviewed by both the district court (R. 52-61) and the court of appeals (Pet. App. 5-7) and found to be without merit. The evidence was clearly sufficient to support a finding that petitioner, although not an original member of the conspiring group, joined the conspiracy before it was consummated by the theft of the tractor-trailer and that he assumed an important and indeed essential function in the conspiracy by assuring his confederates that if they proceeded with their plans to steal the trailer they would be able to secure for the stolen merchandise the money which was their ultimate objective. Petitioner's role in the venture showed the type of "informed and interested cooperation" which this Court has held sufficient to make one liable as a conspirator. *Direct Sales Co.* v. *United States*, 319 U.S. 703, 713.

Neither *Bollenbach* v. *United States*, 326 U.S. 607, nor *United States* v. *Andolschek*, 142 F. 2d 503 (C.A. 2), on which petitioner relies is apposite. The opinion in *Bollenbach* held erroneous a charge by the trial court that possession of goods shortly after the theft raises

a presumption, not only that the possessor was guilty of the theft itself, but also of the interstate transportation of the stolen goods. Here there was direct evidence of petitioner's participation in the conspiracy before the theft as well as after, and there is no issue as to any presumption. In *Andolschek* there was no conspiracy common to all parties. In the present case all the efforts of all the defendants tended to effect a common purpose—the theft of a trailer and the disposition of its load. That the conspirators performed different acts did not splinter the conspiracy into several different conspiracies. *Lefco* v. *United States*, 74 F. 2d 66 (C.A. 3).

2. Petitioner's contention that he was prejudiced by his cross-examination as to what he said at the time of his arrest is refuted by the facts summarized in the Statement. The purpose of government counsel's cross-examination was not to convict petitioner by his silence, but to impeach petitioner's credibility by showing prior inconsistent statements which the government knew petitioner had made to an F.B.I. agent. It is well settled that such questioning is proper cross-examination. 3 Wigmore, *Evidence*, §§1017, 1018 3rd ed. 1940); McCormick, *Evidence*, §§33-40 (1954).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
EUGENE P. MILLER,
Attorneys.

DECEMBER 1962.

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